Filed 2/26/19 P. v. Ballard CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM LAMAR BALLARD et al., Defendants and Appellants.	B282339 (Los Angeles County Super. Ct. No. MA065269)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed with directions.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant William Lamar Ballard.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant John Christopher Brown.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

William Lamar Ballard and John Christopher Brown appeal from judgments of conviction for murder and attempted murder. They contend (1) insufficient evidence supported the convictions, (2) the trial court erred in determining the prosecutor had a race-neutral reason for peremptorily challenging a prospective juror, (3) the court erred in refusing to instruct on self-defense, (4) the court erred in instructing on aider and abettor liability, (5) the prosecutor committed misconduct by failing to disclose exculpatory evidence and by misstating the law during closing argument, (6) fee assessments must be vacated because the trial court made no finding regarding defendants' ability to pay, and (7) changes in the law require resentencing Brown. We reject each contention but the last, and affirm with directions to resentence Brown.

BACKGROUND

A. On the evening of January 17, 2015, Johnny Jones was shot and killed while a bystander during an argument between his fiancé and William Ballard.

Ballard was at one time in a romantic relationship with Faviana Richardson, who by January 2015 was engaged to Johnny Jones. In January 2015, Ballard posted negative comments about Richardson on social media.

On the evening of January 17, 2015, Richardson and several friends went to the home of Ballard's current girlfriend, Toni Cook, and demanded to see Ballard, who was asleep in a back room. Cassie Jones (no relation to the victim) and Shakira W. answered the door and said Ballard was not home. After

Richardson left, Jones informed Ballard about the confrontation, and he telephoned Brown and asked him to come to Cook's house.

Later that evening Ballard attended a neighborhood barbeque event. Richardson and her group arrived and she and Ballard argued, and at one point Ballard told her, "Fuck You. I'll get you popped. I'll kill you."

Richardson left the event but later returned and again argued with Ballard, who again said, "I'll kill you."

Ballard left the event and walked back to Cook's residence, where Brown arrived a short time later. Ballard and Brown then returned to the barbeque, where they confronted Richardson.

With Brown standing next to Ballard and Johnny Jones behind Richardson, Ballard and Brown called Richardson "bitch" several times, to which Jones strongly objected. As he and Ballard prepared to fight, Ballard passed a revolver to Brown and said, "Kill that bitch."

Brown fired a shot at Richardson just as Johnny Jones pushed her out of the way. The bullet struck Jones, killing him.

B. Investigation

After first misidentifying Ballard's "brother," a man she knew only as "Suge," as the shooter, Richardson identified Brown, whom she knew as "Smoke," as the shooter.[1]

Brown was arrested two weeks later. Richardson identified him at the preliminary hearing, testifying she was "100 percent" certain he was the shooter.

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[1] Although when they were dating Ballard had introduced Suge to Richardson as his "brother," she was not certain he had meant the term literally.

C. Trial

Trial was by jury. Brown's defenses were misidentification and alibi. Ballard presented no evidence.

Richardson testified Brown had accompanied Ballard to the barbeque, received a gun from him, and shot Johnny Jones. She heard the shot and saw the gun flash. When asked, "who pulled the trigger?" She testified, "Christopher Brown, whatever. . . . I looked around and turned around and saw Johnny Jones on the floor, and I also saw Christopher standing over him with the gun pointed on him." She testified she was "100 percent sure" Brown was the shooter.

Toni Cook and Shakira W. testified Brown was known by his moniker, "Smoke," and had come to their home in response to Ballard's call after Richardson was turned away from the Jones home. However, neither identified Brown in court as the shooter. Drenae Thomas, a member of Richardson's group, testified "Smoke" was the shooter, but apparently did not identify Brown in court as Smoke.

Sheriff's Detective Dawn Retzlaff testified that Richardson initially identified "Suge" as the shooter but the next day said it had been Brown. She further testified that nine months later, in October 2015, Richardson identified Brown from a photo array. Retzlaff testified that Toni Cook told her a few hours after the shooting that Brown had been in her house that night.

Further testimony revealed that Savon Conway, Brown's wife, was at the shooting, as was her car, which Brown sometimes drove. And cell tower records indicated Conway's cell phone, which Brown sometimes used, was near the scene at the time of the shooting.

The jury found Ballard and Brown guilty of first degree murder and willful, deliberate and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)), and found firearm enhancements to be true. (Pen. Code, §§ 12022, subd. (a)(1), 12022.53, subds. (b)-(d).)[2]

The trial court sentenced Ballard to 26 years to life for the murder plus one year for the firearm enhancement, plus a consecutive term of life for the attempted murder. The court found that Brown had one prior strike and one prior prison term (Pen. Code, § 667, subd. (a)(1)), and sentenced him to 80 years to life for the murder (25 years to life doubled to 50 years to life as a second strike, plus 25 years to life for the firearm enhancement) plus a consecutive term of life for the attempted murder and 20 years on that count for the firearm enhancement.

D. Posttrial

After trial, Brown, joined by Ballard, moved for a new trial, contending the prosecution withheld evidence of Suge's height, facial hair, and criminal history. Brown argued that had he known this information he would have investigated Suge's movements on the night of the shooting and posited him as an alternative suspect. The trial court denied the motion, finding defense had been apprised of all pertinent information and no reasonable possibility existed that a different result would have been reached had more information about Suge been given.

Both defendants appealed.

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

A. Sufficiency of the Evidence

Brown contends insufficient evidence identified him as the shooter because the evidence was inconsistent and unreliable. Ballard purports to join in this argument but offers no discussion on the issue, thus forfeiting the claim. (*People v. Bryant* (2014) 60 Cal.4th 335, 363.)

1. Further Facts Concerning the Investigation

Immediately after the shooting, Richardson told Sheriff's Detective Dawn Retzlaff that "Suge" was the shooter. Richardson had met Suge two or three times at family events when she was dating Ballard. She at different times during the subsequent investigation represented to police that Suge was between five feet six inches and five feet nine inches tall.

The day after the shooting, after Johnny Jones's father had shown Richardson a photograph of Brown, she told detectives she had been mistaken in her identification of Suge, and the shooter was actually Brown, whom she knew as "Smoke." Richardson based her identification in part on Brown's six feet two inches height and his facial hair.

Retzlaff thereafter broadened her investigation to include Brown as well as Suge. She learned Suge's real name was Dionte Canade, and eventually discovered that he and Brown knew each other, as he had been a passenger in Brown's car in 2013, when Brown was arrested for driving under the influence. In March 2015, about a month and a half after the shooting, Suge himself was arrested for firing a gun during a fistfight. His booking information indicated that he was six feet tall, contrary to Richardson's statement that he was five feet six inches and five feet nine inches tall, and had facial hair.

In October 2015, Detective Retzlaff obtained the March booking photo of Suge and included it in a photo array she showed to Richardson during a recorded interview (the "October 2015 interview"). Richardson identified Suge as Ballard's brother, and said he was at the barbeque but had left before the shooting.

She said, "He was there. . . . That's the shooter. No, that's not the shooter. They look just alike. That's his brother." When Retzlaff asked, "That's not the shooter? No?" Richardson responded, "No," and later said, "This one [meaning Suge], this one bugs me. . . . He was there before. . . . [H]e was the one that was like not trying to like be there. Like it was bullshit. . . . Like he always go off on [Ballard] behind me like . . . you start tripping over . . . like it was bullshit. . . . [H]e didn't even do a full park. It's like he just pulled up, hopped out, looked like for real, hopped back in the car, and was like Willie with the bullshit and drove off. . . . It was like before, we hadn't even walked from the house. It was like during the first little argument when Willie walk down there. . . . I wouldn't even say like three minutes. It was like a pull up, pull off."

Richardson said that before her first argument with Ballard, Suge upbraided Ballard for his preoccupation with her. He said, "something about cracking you in the head like getting into it with this bitch, [Johnny Jones] think he winning. Cause he got my bitch, he got my baby momma for taxes. And then he look and he like Faviana? And then he, Willie, he got back in the car and was like Willie with the bullshit."

Detective Retzlaff asked, "OK, so it was before you and Willie were arguing the first time?" Richardson replied, "Yea."

When asked what kind of car Suge drove, Richardson said, "See last time I remembered what kind of car he drive because he have females drive him around and stuff. . . . He was driving a truck. . . . [L]ike an SUV. Like a four door. . . . It was black."

2. Despite Discrepancies, Substantial Evidence Supported the Identification

In reviewing for sufficiency of the evidence, we consider the entire record in the light most favorable to the judgment to determine whether a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Jones* (2013) 57 Cal.4th 899, 960; *People v. Smith* (2005) 37 Cal.4th 733, 738-739.) "[I]t is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt." (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.) That circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction. (Evid. Code, § 411; *People v. Brown* (2014) 59 Cal.4th 86, 106.)

Here, several witnesses identified Brown as "Smoke" and stated he was at Cook's house and later the barbeque on the night of the shooting. Thomas testified that "Smoke" fired the gun, and Richardson positively identified Brown as the shooter. Other witnesses saw Brown's wife and her car near the scene of the shooting, and cell tower evidence indicated a phone Brown often used had connected to towers near the scene. This evidence amply supports identification of Brown as the shooter.

Brown argues the evidence was insufficient because Richardson initially identified Suge as the shooter, and did not identify Brown until the next day, after Johnny Jones's father showed her a photograph of him, and gave inconsistent estimates of his height, revealing her unreliability. Further, she repeatedly told detectives she could not see the faces of Ballard's group because they wore black hoodies, and at the time of the shooting she was not looking at the shooter's face. Brown argues Thomas's identification of him as the shooter was problematic because she also testified she did not see who pulled the trigger. Finally, Brown observes that no one other than Richardson identified him at trial.

We reject Brown's invitation to reweigh the evidence. (*People v. Jackson* (2014) 58 Cal.4th 724, 749.) Weaknesses in identification evidence, discrepancies in testimony, and uncertainty in witness recollection are solely the province of the jury. (*People v. Boyer* (2006) 38 Cal.4th 412, 481; *People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) Testimony of a single witness suffices "even when there is significant countervailing evidence, or the testimony is subject to justifiable suspicion." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1158.) Here, Richardson unequivocally identified Brown as the shooter at trial. This testimony alone would have been enough to support his conviction.

Brown argues the eyewitness evidence against him is inherently improbable, and thus may be reexamined on appeal. (See Evid. Code, § 411; *People v. Brown*, *supra*, 59 Cal.4th at p. 106 [witness testimony that is inherently improbable will not support a conviction].) We disagree. "To be inherently improbable, evidence must assert something has occurred that it

does not seem possible could have occurred under the circumstances disclosed." (*People v. Adams* (1980) 101 Cal.App.3d 791, 797.) There is nothing impossible or inherently improbable about a witness accurately identifying a shooter after having seen only portions of the shooting, for example the transfer and pointing of a gun just before the shot. A witness may also identify another by something other than his face, and may correct an initial misidentification. Although Brown illuminates at length the weaknesses in the prosecution's identification evidence, weakness does not equate with inherent improbability.

B. Brown's *Batson/Wheeler* Motion[3]

Brown contends the prosecution impermissibly exercised a peremptory challenge to exclude a prospective juror on account of her race. We disagree.

During voir dire, an African-American prospective juror in seat number six stated she was a retired nurse, her spouse had been a Los Angeles County peace officer for many years, and she had four adult children, one of whom lived in a group home in Los Angeles. She stated her husband's prior occupation as a peace officer would not cause her to favor one side or the other. When asked if her son in the group home was a counselor there, Prospective Juror No. 6 answered that no, a court had ordered him to the home when he "got started on drugs[, which] sort of threw him off."

The prosecution exercised a peremptory challenge to excuse Prospective Juror No. 6, to which Brown's attorney objected.

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[3] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

Finding the defense had made a prima facie showing of impermissible racial bias, the trial court invited the prosecutor to explain his decision. The prosecutor said he was concerned that because of her son, Prospective Juror No. 6 "may have sympathy for somebody that is now going through the system itself." He also stated that the prospective juror seemed "reluctant to speak about a child that had gone through the system," did not give "very clear concise answers," and had implied that her son *worked* at the group home rather than residing there, apparently reluctant to admit he had been committed there by a court.

The trial court disagreed with these latter statements, finding the prosecutor had misunderstood Prospective Juror No. 6's responses, who in fact had not been evasive; but the court stated that her "having a child who did have a chemical dependency issue and [had] gone through the system" was a race-neutral ground upon which to exclude the prospective juror.

Brown argues the trial court impermissibly created its own post hoc rationale for the prosecutor's racially biased decision to exclude Prospective Juror No. 6. We disagree.

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson*, *supra*, 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) The "exercise of even a single peremptory challenge solely on the basis of race or ethnicity" violates these constitutional principles and "constitutes

structural error, requiring reversal." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157-1158.)

"The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims." (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 612-613; *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1158.)

To make a prima facie showing of impermissible discrimination, a defendant must produce "evidence ' "sufficient to permit the trial judge to draw an inference that discrimination has occurred." ' " (*People v. Jones*, *supra*, 57 Cal.4th at p. 916.) Once a prima facie case of group bias appears, the prosecution must demonstrate a proper basis for the allegedly offending challenge, and the court must "satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' "

(*People v. Hall* (1983) 35 Cal.3d 161, 167-168.) A trial court may not merely accept a prosecutor's explanation at face value. (*Id*. at p. 169.)

"Because [*Batson/*]*Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155; *People v. Lenix*, *supra*, 44 Cal.4th at pp. 613-614 ["We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses"].)

Here, the prosecutor demonstrated a race-neutral basis for challenging Prospective Juror No. 6: Her child had had an adverse interaction with the court system. A prospective juror's negative experiences with law enforcement can serve as a valid basis for a peremptory challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.)

Brown argues the trial court relied on a justification not offered by the prosecutor. He argues the prosecutor challenged Prospective Juror No. 6 because she was evasive, whereas the court affirmed the challenge on the ground that her having a son in the system might cause her to be biased. Brown argues these circumstances suggest the trial court either disbelieved the prosecutor or failed to make a good faith inquiry in to the offered rationale. The argument is without merit.

Trial courts "should not . . . substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. '[A]

prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' " (*People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1159.)

Here, the prosecutor's rationale and the trial court's finding coincided. The prosecutor's mistake concerning the candidness of Prospective Juror No. 6 neither conflicted with the court's finding nor itself established racial bias. (See *People v. Jones* (2011) 51 Cal.4th 346, 366.) "No reason appears to assume the prosecutor intentionally misstated the matter," and it is "quite plausible that he simply made an honest mistake of fact." (*Ibid.*) An " 'isolated mistake or misstatement' [citation] does not alone compel the conclusion that th[e] reason was not sincere." (*Ibid.*) Deferring to the trial court's personal observations of the manner in which the prosecutor offered his explanation, as we must, we conclude the court acted within its discretion in crediting the prosecutor and denying Brown's motion.

C. Jury Instruction on Self-Defense

At trial, evidence came out that Johnny Jones's brother, who was present at the shooting, had possessed a handgun, may have tried to fire it, and after the shooting told another person that his "burner jammed." Brown and Ballard contend this evidence suggests the shot that killed Johnny Jones could have been fired in self-defense, and the trial court erred when it refused to instruct the jury on self-defense. We reject the argument because no evidence suggested that either Brown or Ballard saw anyone else with a gun.

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

"[A] trial court in a criminal case is required—with or without a request—to give correct jury instructions on the general principles of law relevant to issues raised by the evidence." (*People v. Mutuma* (2006) 144 Cal.App.4th 635, 640.) The trial court has a duty to instruct sua sponte regarding a defense " ' "if it appears that the [appellant] is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the [appellant's] theory of the case." ' " (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Substantial evidence is that which, if believed, would be sufficient for a jury to find a reasonable doubt as to defendant's guilt. (*People v. Michaels* (2002) 28 Cal.4th 486, 529.)

Pursuant to the imperfect self-defense doctrine, an unlawful killing done with an intent to kill constitutes voluntary manslaughter, rather than murder, "when the defendant acts upon an actual but unreasonable belief in the need for self-defense." (*People v. Stitely* (2005) 35 Cal.4th 514, 551.) Under the perfect self-defense doctrine, a homicide is entirely "noncriminal where the actor possessed both an actual and reasonable belief in the need to defend." (*Ibid.*) In either situation, the defendant must actually fear imminent danger to life or great bodily injury. (*Ibid.*) The trier of fact "must consider what 'would appear to be necessary to a reasonable person' " in the position of the defendant, with the defendant's knowledge and awareness. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.)

The question here turns on whether the record contains substantial evidence that if believed by the jury would raise a

reasonable doubt as to whether defendants shot Johnny Jones in an effort to defend themselves. Because nothing indicates either Brown or Ballard knew Jones's brother had a gun, no reasonable juror could have found they shot Jones in order to defend themselves against being shot.

D. Ballard's Conviction for First Degree Premeditated Murder Was Not Based on the Improper Theory of Natural and Probable Consequences

Ballard was convicted of first degree murder as an aider and abettor of Brown, the actual shooter. He contends the jury may have convicted him under an improper aider and abettor theory because it cannot be ascertained whether the jury found he personally deliberated and premeditated the murder of Jones. The argument is without merit because whether Ballard premeditated and deliberated the murder of *Jones* is irrelevant. The jury found that Ballard premeditated and deliberated the murder of *Richardson*. The mens rea for *that* offense transfers to the murder of Jones by operation of law.

"First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation . . . . [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.)

"There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime,' " i.e., the target offense.

(*People v. Chiu*, *supra*, 59 Cal.4th at p. 158.) Second, an aider and abettor is guilty of most nontarget offenses that occur as a natural and probable consequence of the crime aided and abetted. (*Ibid*.)

But not first degree murder. Under the natural and probable consequences doctrine, an aider and abettor is liable for reasonably foreseeable consequence of a principal's criminal act. " 'By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. . . . [C]ulpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*People v. Chiu*, *supra*, 59 Cal.4th at p. 164.) It therefore follows that an aider and abettor whose only premeditative mental state was that he should have foreseen the nontarget crime cannot be found guilty of first degree premeditated murder, which requires willfulness, premeditation, and deliberation. (*Id.* at pp. 158-159.)

If a trial court "instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 167.) For example, an error may be held harmless " 'if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1204.)

Here, the trial court instructed the jury on murder, explaining that for defendants to be convicted the prosecution had to prove they "had a state of mind called malice

aforethought." The court explained, "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. . . . The defendant acted with implied malice if . . . [h]e intentionally committed an act . . . [t]he natural and probable consequences of the act were dangerous to human life." The court explained that to constitute first degree murder, the prosecution additionally had to prove that the defendant "acted willfully, deliberately, and with premeditation."

The court also instructed the jury on *direct* aiding and abetting liability, explaining that to establish liability under an aiding and abetting theory the prosecution had to prove the defendant "[knew] of the perpetrator's unlawful purpose and he or she specifically intend[ed] to, and [did] in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

Notably, the trial court, in compliance with *People v. Chiu*, did *not* instruct the jury on the natural and probable consequences doctrine of aider and abettor liability.

Finally, the trial court instructed the jury on the doctrine of transferred intent.

None of these instructions was erroneous.

Ballard argues his conviction must nevertheless be reversed unless the jury found he personally deliberated and premeditated the murder of Johnny Jones. The argument is without merit. " 'Under the common law doctrine of transferred intent, if *A* shoots at *B* with malice aforethought but instead kills *C*, who is standing nearby, *A* is deemed liable for murder notwithstanding lack of intent to kill *C*.' " (*People v. Sanchez* (2001) 26 Cal.4th 834, 850, fn. 9.) Under the doctrine of

transferred intent, Ballard was properly convicted for the murder of Jones because the jury found he willfully and with premeditation and deliberation tried to murder Richardson. His actual mental state as to Jones was irrelevant.

Ballard argues the jury was instructed he could be found guilty of first degree murder as an aider and abettor of an implied malice murder. He is incorrect. Although the trial court instructed that *second* degree murder could be committed with only implied malice, it instructed that to establish *first* degree murder the prosecution additionally had to prove that the defendant "acted willfully, deliberately, and with premeditation." The court further instructed that to find Ballard guilty as an aider and abettor of first degree murder the jury had to find he knew of Brown's unlawful purpose and specifically intended to facilitate it.

Having failed to identify any instructional error, Ballard argues that transferred intent "falls within the scope and concept of a natural and probable consequence," and the jury could have followed the former doctrine to find him guilty under the latter. We disagree.

The doctrine of transferred intent has nothing to do with the natural and probable consequences theory of aider and abettor liability. (See *People v. Vasquez* (2016) 246 Cal.App.4th 1019, 1024 ["the doctrine of transferred intent does not implicate the concerns raised in *Chiu*, in which the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder"].) The requisite intent for the murder of Johnny Jones was established by Ballard's and Brown's intent to murder Richardson. Purely as a matter of policy and by operation of law,

that intent is deemed to have transferred to Jones. (*Id*. at p. 1026.) " 'The transferred intent doctrine does not . . . denote an actual "transfer" of "intent" from the intended victim to the unintended victim. [Citation.] Rather . . . it connotes a *policy*—that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark. [Citation.] It is the policy underlying the doctrine, rather than its literal meaning, that compels the conclusion that a transferred intent instruction [be] given.' " (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 850, fn. 9.)

In sum, nothing in the record permits us to conclude the jury based its first degree murder verdict on an invalid aider and abettor theory.

E. Prosecutorial Misconduct

Ballard contends the prosecutor misstated the law on premeditation and deliberation when he said that "someone overcoming the resistance on the hammer of a revolver or cocking of the revolver to the rear . . . would be an example of willful, deliberate, and premeditated murder" when combined with other circumstances.

Ballard also contends the prosecutor misstated the law on reasonable doubt when he said that the prosecution's burden was to show its theory was "the only reasonable explanation that fits all the facts."

Ballard's defense counsel offered no objection to the statements at trial, which Ballard argues constituted ineffective assistance, preserving the objection on appeal.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial

with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "When a claim of misconduct is based on the prosecutor's comments before the jury . . . , ' " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " ' [Citations.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.)

We review a prosecutor's remarks " '[i]n the context of the whole argument and the instructions' " to determine whether "there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Here, Ballard made no contemporaneous objection to either of the statements to which he now objects. Because no basis exists in the record to conclude an objection would have been futile, the issue is forfeited.

In any event, Ballard's objections are without merit.

"Premeditation" means " ' "considered beforehand," ' " and deliberation means " 'formed or arrived at or determined upon as a result careful thought and weighing of considerations for and against the proposed course of action.' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) Premeditation and deliberation may be

found in overcoming a heavy trigger pull to fire a shot (see *People v. Watkins* (2012) 55 Cal.4th 999, 1026) or in cocking a weapon and firing shots to the victim's chest (*People v. Manriquez* (2005) 37 Cal.4th 547, 577).

In his remarks on reasonable doubt, the prosecutor told the jury that proof beyond a reasonable doubt required an abiding conviction but not "100 percent certainty" or proof "beyond all doubt," and the prosecution had to show its theory was the "only reasonable explanation that fits all the facts." We fail to see the problem with this statement, and Ballard illuminates none. He argues the prosecutor essentially meant that to raise a reasonable doubt the *defense* had to show *its* theory was the only reasonable explanation that fit all the facts. But this is not what the prosecutor said.

In context, we do not interpret the prosecutor's comment as reversing the burden of proof.

F. There was No Brady[4] Error

Brown contends the prosecution failed to disclose Suge's March 2015 booking information and photograph, which was material exculpatory evidence. He also contends the prosecution presented false evidence when it permitted Detective Retzlaff and Richardson to deny Richardson was ever shown Canade's photograph. We disagree with both contentions.

1. Further Testimony and Details about the Investigation

Richardson told Detective Retzlaff immediately after the shooting that Suge was the shooter, describing him variously as between five feet six and five feet nine inches tall. In the course

[4] *Brady v. Maryland* (1963) 373 U.S. 83.

of her investigation Retzlaff discovered that two years earlier Suge had been present when Brown was arrested for driving under the influence, and in March 2015, two months after the shooting, he was arrested for firing a gun during a fight. His booking information indicated he was six feet tall—similar to Brown's six feet two inches—and had facial hair, as did Brown. She also discovered his true name was Dionte Canade.

Although Retzlaff showed Richardson Suge's March 2015 booking photo in October 2015, when she included it in a six-pack photo array, both testified incorrectly that Richardson had never been shown the photo. (Respondent suggests they simply forgot about the October 2015 photo array. The simpler explanation is they were both testifying about an earlier stage of the investigation.)

When Brown's attorney at trial asked Retzlaff, "Did you get a picture of Dionte Canade?" Retzlaff replied, "Yes, I have a photograph." She said she did not show Richardson the photograph initially because he was not a suspect. Brown's attorney asked, "So the night of the shooting, Faviana tells you in a 75-page transcript interview . . . that the person who did this is Suge, you identified who Suge is, and you don't exhibit a photo of Suge to that witness because he isn't your suspect?" Retzlaff replied, "That's correct." Retzlaff testified that no one other than Richardson had mentioned Suge, but almost all the witness mentioned Smoke. She said Smoke therefore became the focus of the investigation rather than Suge, because there was "no evidence that, one, Suge was there or that, two, Suge fired a gun."

In posttrial proceedings it was revealed that during a break in Retzlaff's testimony Brown's attorney asked her for a copy of

the photograph, but when she offered it to him he changed his mind and walked away without it.

During closing argument, Brown's attorney argued that immediately after the shooting Richardson was certain that Suge was the shooter, and had said Suge and Brown looked alike. Counsel then rhetorically asked why Retzlaff failed to show Richardson the photograph of Canade. Counsel said, "Is it because he looks so much like John Brown that it would confuse even you? Isn't it here? Why didn't the detective do her job? Not reach a conclusion, but do her job and do the investigation. Why didn't anybody from the L.A. Sheriff's Department?" Brown's attorney reiterated that Richardson was an unreliable witness, and asked, "Why don't we have a picture of Suge, also known as Dionte Canada?[5] Is it because it's so close you would have a problem? We don't know."

Counsel argued, "Now, why wouldn't the detective exhibit the photograph that she had of Dionte Canada to Faviana? Why wouldn't she do that? If Faviana has spent an hour and a half telling you it's Suge—yes, she said somebody else subsequently, but you have reason to believe that that subsequent identification is questionable. So why—the question comes back, why wouldn't you go and offer the photo of Dionte Canada in a six-pack and let her say no, it's not him? I'm absolutely sure it was the other guy. Or maybe we find out, oh, well. Now I don't know. And, of course, I don't want to impute bad motives to the detective. . . . And in this case, the detectives had a reasonable conclusion they brought themselves to, but it's incomplete.

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[5] The correct spelling of Canade's name was not known to the parties until after trial.

The upshot is that Retzlaff never showed the October 2015 six-pack array to the prosecution or defense, and neither was aware of the booking information describing Suge as being six feet tall and having facial hair. In fact, at the time of trial neither the prosecution nor defense even knew the correct spelling of Suge's proper name. And although the prosecutor provided the defense with an audio recording of the October 2015 Richardson interview, defense counsel neglected to listen to it, and the prosecutor took no particular note of the October 2015 photo array depicting Suge.

As a result of these circumstances, both the prosecutor and defense counsel knew at trial that Retzlaff possessed a photograph of Suge, but neither knew it was a March 2015 booking photo, and neither knew Retzlaff had shown Richardson the photo in October 2015.

2. Pertinent Law

"Under *Brady* . . . and its progeny, the prosecution has a constitutional duty to disclose to the defense material exculpatory evidence, including potential impeaching evidence. The duty extends to evidence known to others acting on the prosecution's behalf, including the police. [Citations.] The duty to disclose 'exists even though there has been no request by the accused.' [Citations.] For *Brady* purposes, evidence is material if it is reasonably probable its disclosure would alter the outcome of trial. [Citations.] [¶] 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have

ensued.' " (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 709-710 (*Johnson*).)

3. Analysis

Brown argues the prosecution suppressed Suge's March 2015 booking information. We disagree.

Brown knew that Richardson had initially identified Suge/Canade as the shooter. Being personally acquainted, he knew Suge's height, and either knew or could have discovered his real name and whether he had facial hair at the time of the shooting. By the time of trial, Brown also knew about the March 2015 booking photo, and possessed an audio recording of the interview wherein Richardson looked at the photo and denied Suge was the shooter.

Further, Retzlaff offered Brown's counsel the Suge/Canade booking photo at trial, but he refused it, and then strenuously argued to the jury that Retzlaff's purported refusal to produce the photo was somehow significant.

In short, Canade's March 2015 booking information was never suppressed.

Nor was Canade's booking information either material or favorable to Brown.

Evidence is material "if it is reasonably probable its disclosure would alter the outcome of trial." (*Johnson*, *supra*, 61 Cal.4th at pp. 709-710.) Here, when shown Canade's photograph Richardson convincingly demonstrated she knew him but, consistent with her stance since the day after the shooting, definitively stated he was not the shooter.

Brown argues that had he had Canade's booking information before trial he could have investigated his movements and possibly established him as an alternative

suspect. He also could have impeached Richardson by showing she was an unreliable witness when it came to Canade's height, or at least could have demonstrated the police investigation was shoddy, which is itself a defense. The arguments are without merit because Brown and Ballard, both well acquainted with Canade—always had the opportunity to investigate his movements and either posit him as an alternative suspect or otherwise impugn the investigation or impeach witness testimony. The booking information added nothing they did not already know. And at trial Brown's attorney fully explored both Richardson's percipience and the quality of the investigation.

The presence or absence of Canade's March 2015 booking information could have made no difference.

G. Resentencing Under Section 12022.53 and Senate Bill No. 1393

When sentencing Brown, the trial court imposed mandatory enhancements under section 12022.53 upon finding he had used a firearm in committing the crimes. The court further enhanced his sentence due to his recidivism pursuant to section 667, subdivision (a)(1).) At the time of sentencing a trial court had no authority to strike firearm enhancements proven under section 12022.53, but Senate Bill No. 620, which became effective January 1, 2018, removed the prohibition on striking such enhancements, amending section 12022.53 to provide "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section." Similarly, on September 30, 2018, the Legislature amended section 1385 to remove a provision preventing a judge from striking prior serious felony convictions for purposes of sentence enhancement under section

667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1 (Sen. Bill No. 1393), effective Jan. 1, 2019.)

An amendment to the Penal Code will not generally apply retroactively (see § 3), but an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) Reduction of a punishment indicates the Legislature has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act," and "should apply to every case to which it constitutionally could apply." (*Ibid*.)

The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant's punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

Brown argues the amendments to sections 12022.53 and 1385 apply retroactively to defendants in his position, and require that the trial court be given an opportunity to exercise its newfound discretion to strike the firearm and recidivism enhancements imposed as part of his sentence. The People concede the point, and we agree. Although the trial court here had no discretion to strike the enhancements at the time of sentencing, the record is silent as to whether it might have been open to doing so. Therefore, the matter must be remanded to afford the court an opportunity to exercise its discretion.

H. Assessments of Fines and Fees Need Not Be Vacated

The trial court imposed $40 court security fees (§ 1465.8) and $30 conviction assessments (Gov. Code, § 70373) on each defendant for both counts of which each was convicted. The court also imposed $10,000 restitution fines (§ 1202.4), imposed and

stayed $10,000 parole revocation fines (§ 1202.45), and imposed $6,700 in restitution (§ 1202.4) on each defendant.

Ballard, joined by Brown, argues the fines and fees must be vacated because to impose them without a finding of ability to pay violates due process. We disagree.

Due process prohibits imposition of penal consequences on a defendant for nonpayment of court-ordered assessments and fines which the defendant has no ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168 (*Dueñas*).) But the court need determine ability to pay only upon the defendant raising the issue and making a prima facie showing of inability. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749 [defendant's burden to timely raise the issue].) Here, neither Ballard nor Brown contended below that he was unable to pay the various fees and fines assessed, and neither asserts such inability on appeal. Therefore, the fees and fines need not be vacated.

Defendants argue that pursuant to *Dueñas* a trial court has a sua sponte duty to make a finding on an indigent defendant's ability to pay before imposing fines and fees. We do not necessarily disagree. But here nothing in the record suggests either Ballard or Brown is indigent. Defendants argue that *Dueñas* created a new requirement that a trial court inquire into a defendant's ability to pay a fine even absent the defendant's request. We disagree. The court made no such ruling explicitly, but instead obligated the trial court to make findings as to "the" defendant, i.e., the one before it, not as to defendants in general. Because the rule is well established that a defendant must argue fees are unpayable before a court must evaluate ability to pay (see *People v. Acosta* (2018) 28 Cal.App.5th 701, 707-708), we

think it unlikely the *Dueñas* court intended to abrogate the rule by implication. In any event, no such issue was before the court, as the defendant in *Dueñas* did in fact request a determination of her inability to pay assessed fines, and it was undisputed she could not pay them. An appellate ruling cannot be interpreted to resolve an issue not before the court.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall determine whether to strike any enhancements imposed under sections 12022.53 or 667, subdivision (a)(1). If the court strikes any such enhancements, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.